No. 14-981

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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF SIX EDUCATIONAL NONPROFIT ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are six nonprofit organizations working in public education at the primary and secondary school levels: Education Reform Now, Democrats for Education Reform Now, Green Dot Public Schools, the Northeast Charter Schools Network, A+ Denver, and Students Matter. Statements from individual *amici* are attached as Appendix A, but as a group *amici* are committed to higher education for students—and especially students from minority groups and of lower socioeconomic statuts—to participate in a learning environment where meaningful campus diversity allows them to realize their own individual identities. All *amici* understand that conventional admission practices in higher education have proven biased against students of color, resulting in college student populations that reinforce a historically discriminatory *status quo* while depriving all students of the richest possible learning environment. Race-consciousness in admissions is still necessary to offset these patterns and provide these students access to a future that reflects their having realized the benefits of having been educated in a truly diverse educational setting. For these reasons, *amici*

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the above-mentioned *amici* or their counsel, made a monetary contribution that fund the preparation or submission of this brief in any manner.

respectfully submit this Brief in support of Respondents UT seeking affirmance of the decision in the Fifth Circuit Court of Appeals below.

SUMMARY OF ARGUMENT

The University of Texas at Austin (UT) explicitly considers race in making decisions with regard to admissions in a limited but essential way. The undersigned *Amici* respectfully submit this Brief because UT's race-conscious policy is not only constitutionally permissible, but is actually constitutionally *required* if UT is to seek the educational benefits that flow from racial diversity. The reason for this—and the heart of *Amici*'s argument here—is that concern for intraracial diversity is at the core of UT's consideration of race.

Intraracial diversity refers, in the university setting, to a student body that reflects a range of backgrounds and cultures within individual racial groups. This means, for example, enrollment of African-American students that come from urban, suburban, and rural environments, from racially integrated regions as well as segregated ones, from a range of socioeconomic backgrounds, and from ancestries that trace back to American slavery, as well as from more recent African and Caribbean lineages; among other characteristics. Likewise, the achievement of intraracial diversity requires enrollment of a Latino population that is itself diverse—one that reflects the multiple geographies, histories, economic circumstances, educational backgrounds, ethnicities, and cultures that make up the composite racial group that is "Latino."

That intraracial diversity must be a part of UT's policy derives from the Equal Protection analysis applicable to racial classifications. Such classifications are subjected to strict scrutiny; to survive, they must further a compelling interest which the racial classification is narrowly tailored to achieve. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Accordingly, *Amici* first argue that universities like UT have a compelling interest in intraracial diversity, which is vital to achieving the benefits of diversity in education generally. Next, *Amici* argue that attention to intraracial diversity satisfies the narrow tailoring requirement, and indeed, that the narrow tailoring requirement mandates intraracial diversity.

ARGUMENT

I. UT HAS A COMPELLING INTEREST IN INTRARACIAL DIVERSITY.

Universities like UT have a compelling interest in intraracial diversity, that is, in assembling a student body with African-American and Latino students of multiple geographic, socioeconomic, educational, and cultural backgrounds. This compelling interest flows from both this Court's Equal Protection doctrine regarding affirmative action in education, and consideration of the fact that intraracial diversity is essential to achieving the benefits of diversity. Each argument is addressed below.

(1) Equal Protection Doctrine Recognizes a Compelling Interest in Intraracial Diversity.

Public universities have a compelling state interest in the diversity of their student bodies. *Grutter*, 539 U.S. at 329; *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 314-15 (1978). This is because of the immense benefits that accrue from diversity in education, which have been repeatedly recognized by this Court. *Grutter*, 539 U.S. at 328-36; *Bakke*, 438 U.S. at 313-17. In *Bakke*, Justice Powell cited the importance of diversity to fostering a "robust exchange of ideas," exposure to which was itself critical to training a generation of future leaders. 438 U.S. at 312-13 (internal citation omitted). *Grutter* expanded on *Bakke* to include promotion of "cross-racial understanding" and dismantling stereotypes. 539 U.S. at 330 (internal citation omitted). In finding the benefits of diversity in education to constitute a compelling state interest, this Court has relied upon empirical findings showing, "that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Grutter*, 539 U.S. at 330 (internal citation omitted). Research in this field has continued since the time of *Grutter* and lends ever stronger empirical support for the importance of diversity in education.[2]

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[2] For excellent discussions of the research on the benefits of diversity in education, *see* Brief for Social and Organizational Psychologists as *Amici Curiae* Supporting Respondents,

To realize the benefits of racial diversity in education, universities must admit racial minority populations that are not only numerically meaningful but also themselves diverse. *See* Marta Tienda, *Diversity ≠ Inclusion: Promoting Integration in Higher Education*, 42 Educ. Res. 467, 471 (2013); *see also* Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 Cardozo L. Rev. 97, 133-34 (2007). Thus, racial minority admissions must "transcend demographic traits and include less discernible, but equally consequential, differences in ideological perspectives, social class, values, religious beliefs, and the like." Tienda, 42 Educ. Res. at 471. Intraracial diversity means that a university must show concern for "whether the school has admitted particular 'types' of African Americans," particular types of Latinos, where 'types' is shorthand for the variety of factors that make up personal identity—geography, ethnic lineage, socioeconomic status, school background, cul-

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Fisher v. University of Texas at Austin, 133 S.Ct. 2411 (2013) (No. 11-345), 2012 WL 3308289 (discussing research on the role of diversity in promoting campus integration and reduction of prejudice and "stereotype threat"); Brief of Experimental Psychologists as *Amici Curiae* in Support of Respondents, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345), 2012 WL 3540405 (discussing research on the role of diversity in mitigating "stereotype threat" to improve academic performance); Brief of American Psychological Association as *Amici Curiae* in Support of Respondents, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345), 2012 WL 3527855 (discussing findings that diversity in education improves cognitive function, academic performance, civic engagement, and professional competency).

ture, and more. Devin Carbado, *Intraracial Diversity*, 60 UCLA L. Rev. 1130, 1134 (2013); *accord* Dierdre Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L. J. 1197, 1206 (2010).

That intraracial diversity is a component of the compelling interest in diversity more generally follows directly from this Court's Equal Protection jurisprudence. Preliminarily, of course, that jurisprudence requires deference to universities in terms of how they choose to define diversity. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 792 (2007) (Kennedy, J., concurring) (noting that the Constitution affords schools "particular latitude in defining diversity"); *Grutter*, 539 U.S. at 333 (citing the "experience and expertise" of admissions personnel); *Bakke*, 438 U.S. at 317-18 (finding that universities must have latitude in defining diversity because, "the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class."). Thus, where universities like UT understand intraracial diversity to be central to their achievement of the benefits of diversity, this Court should defer to that understanding.

But deference aside, this Court has long recognized intraracial diversity as a compelling state interest. In *Bakke*, Justice Powell eschewed an understanding of diversity that focused on mere numbers, writing that, "[t]he diversity that furthers a compelling state interest encompasses a far

broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315. "Thus, the critical criteria," Justice Powell held, "are often individual qualities or experience not dependent upon race but sometimes associated with it." *Id.* at 324. Justice Powell articulated a specific concern for intraracial diversity in citing and appending a summary of the Harvard Admissions Plan, which described the sorts of factors utilized by admissions officers seeking to achieve intraracial diversity:

> The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa.

Id. at 324. From the time of *Bakke*, then, the Court has accepted intraracial diversity as a component of the compelling State interest in diversity in education. *See* Elise M. Bodde, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. Pa. J. Const. L. 781, 808 (2015) ("[A]n often overlooked portion of Justice Powell's opinion also fully ratified the principle of intraracial diver-

sity as a logical extension of diversity's educational benefits.").

This understanding has remained a fixture of the Court's equal protection and affirmative action jurisprudence. In *Grutter*, the Court upheld the affirmative action policy at issue at least in part because, "[t]he Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.' To the contrary, diminishing the force of such stereotypes is [] a crucial part of the Law School's mission[.]" *Grutter*, 539 U.S. at 333 (2003) (internal citation omitted).[3] In *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003), the Court reemphasized "the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education." Such consideration, of course, necessarily includes attention to differences between members of the same racial group—just as the Harvard Admissions Plan manifested in its hypothetical comparison of African-

[3] *Grutter* adopted the term "critical mass" to refer to the kind and extent of diversity necessary to achieve the benefits of diversity in education. 539 U.S. at 330 ("[T]he Law School's concept of critical mass is defined by reference to the education benefits that diversity is designed to produce."). Because intraracial diversity is essential to achieving the benefits of diversity in education, as discussed in this Section, critical mass, as the authorities below make clear, is understood to include intraracial diversity.

American applicants of different backgrounds. And preserving this focus upon differences within and across racial groups has been critical to the Court's recognition of diversity in education as a compelling interest: "[t]he Court was exceedingly careful in describing the interest furthered in *Grutter* as 'not an interest in simple ethnic diversity' but rather a 'far broader array of qualifications and characteristics' in which race was but a single element." *Parents Involved in Community Schools*, 551 U.S. at 740 (2007) (O'Connor, J., concurring) (internal citations omitted); *accord* Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 Tul. L. Rev. 1767, 1770 (2004) ("Both for Justice Powell and for the *Grutter* Court, diversity includes the full range of traits and experiences that distinguish and individualize human beings[.]"). In this manner, concern for real diversity—both within and among groups—has always been central to the Court's endorsement of educational diversity as a compelling interest.

(2) Intraracial Diversity Is Necessary to Achieve the Benefits of Diversity in Education.

That intraracial diversity—diversity within, as well as among, racial groups—is a compelling State interest is also clear from the fact that it is necessary to realizing the educational benefit of diversity recognized by this Court. Specifically, intraracial diversity is essential to achieving the benefits of:

dismantling stereotypes and promoting cross-racial understanding and integration.

In particular, intraracial diversity breaks down stereotypes by creating a student body with "a sufficiently diverse group of perspectives within each racial group" to defeat prevailing generalizations. Vinay Harpalani, *Diversity within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. Pa. J. Const. L. 463, 477 (2012). Scientifically, this process is rooted in the concept of "disequilibrium," which describes the manner in which new information that does not fit a person's belief system results in the disruption and ultimate replacement of that belief system with one that better explains all known information. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Rev. Educ. Res. 4, 9 (2010). Disequilibrium is critical to dismantling racial stereotypes, on campus or otherwise. *Id.* Students entering a university setting, like all people, have belief systems made up of generalizations from prior experiences, whether or not those experiences have been sufficient to rationally support any generalizations at all. Daniel Kahneman, *Thinking, Fast and Slow* 79-88 (2011) (describing cognitive bias for conclusions on the basis of experience even in the absence of sufficient information). Among these generalizations are racial stereotypes, based upon incomplete and inaccurate information. Charles Stangor and James E. Lange, *Mental Representations of Social Groups: Advances in Understanding Stereotypes and Stereotyping*, 26 Advances Experimental Soc. Psychol.

357, 357 (1994) ("Just as we categorize cars and teacups, we order our social worlds according to perceived similarities among people who share skin color, ethnic or religious group membership, social class . . . and other social features."). Upon entering university, most students have extremely limited experience interacting with students of other races. *See* Gary Orfield, *Foreword* to Catherine L. Horn & Stella M. Flores, *The Civil Rights Project, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, at ix (2003); Laycock, 78 Tul. L. Rev. at 1803 ("De facto segregation not only persists, but is actually increasing."). In the absence of personal experience, students are likely to draw generalizations based on information presented in entertainment and mass media, infected as they are by well-documented racial bias. *See, e.g.* Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 Md. L. Rev. 849, 890-93 (2010) (describing cognitive bias resulting from media depiction of "superpredators" in legal approach to juvenile criminality by youth of color); *see generally* Robert M. Entman & Andrew Rojecki, *The Black Image in the White Mind: Media and Race in America* (2000); *see generally* Ediberto Román, *Who Exactly Is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. Gender Race & Just. 37 (2000). The net result is prevalent negative stereotyping of racial minority students on campus. *See, e.g.*, Carey S. Ryan, *Accuracy of Black and White College Students' In-Group and*

Out-Group Stereotypes, 22 Pers. Soc. Psychol. Bull. 1114 (1996).

A diverse student body has the power to counter such stereotypes, as the Court has recognized. *Grutter*, 539 U.S. at 333. But it is intraracial diversity in particular that truly presents the sort of experiences which confound racial stereotypes for university students. As an initial matter, assembling a student body that is diverse within racial groups immediately dispels the simple but prevalent stereotype that there is a singular 'minority' viewpoint. Addis, 29 Cardozo L. Rev. 97 at 142. And diversity within racial groups also serves to disconnect assumed links between racial groups and particular positions:

> It is equally important for students to learn that . . . disagreements among the races are only statistical tendencies—that on any given issue, and even when there are sharp racial disparities in the opinion polls, many minority individuals will not hold the presumed or stereotypical minority position, and many white individuals will not hold the presumed or stereotypical white position. The differences within each racial group are as important as the differences between racial groups[.]

Laycock, 78 Tul. L. Rev. at 1771. Intraracial diversity also explodes perceived associations between racial groups and particular demographic characteristics, such as the "common stereotype of Black and Latina/o students[] that all students from these groups come from poor, inner-city back-

grounds." Harpalani, 15 U. Pa. J. Const. L. at 513. Schools like UT combat such stereotypes by seeking to admit African-American and Latino students from elevated socioeconomic and/or non-urban backgrounds. *Id.* In essence, consideration of intraracial diversity on the part of universities creates an environment in which the pre-existing racial biases of students are contradicted by experiences on campus. This effect has been consistently demonstrated; simply put, the evidence is strong that when students are faced with proof that their racial generalizations are misguided, their views change. Bowman, 80 Rev. Educ. Res. at 9; Stangor & Lange, 26 Advances Experimental Soc. Psychol. at 391 ("[A]nother approach to reducing the negative outcomes of stereotypes on responses to others is to influence which representations are activated upon contact with individuals.").

Indeed, empirical research also shows intraracial diversity to be essential to the goal of cross-racial understanding and integration on campus. This follows from an understanding of the late psychologist Gordon Allport's "contact theory." Allport hypothesized that hostility between groups could be mitigated for individual members by repeated interpersonal contact with members of the alternative group under certain conditions. Thomas F. Pettigrew and Linda Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psych. 751, 752 (2006). Allport theorized that mere contact between members of different racial groups could, under certain conditions, reduce prejudice between them. *Id.* Under this theory, the beneficial

effects of interracial contact are not limited to the specific individuals who come in contact with each other; instead, contact with one or a few members of a particular group will result in the reduction or elimination of prejudice towards that group generally. *Id.* at 766. Allport noted four conditions as being critical for contact to reduce prejudice: "equal status between the groups in the situation; common goals; intergroup cooperation; and the support of authorities, law, or custom." *Id.* at 752.

For present purposes, the most salient of these conditions is the requirement of equal status between the groups in question. In the educational setting, this means that, "[t]he out-group—in this case, students of color—must have equal social standing as the in-group: white students." Dierdre Bowen, *American Skin: Dispensing with Color-blindness and Critical Mass in Affirmative Action*, 73 U. Pitt. L. Rev. 339, 384 (2011) (internal citations omitted). But as a demographic matter, racial minorities are disproportionately of lower socioeconomic status, both in the American population as a whole and in the university context. *See* Rakesh Kochher *et al.*, *Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, Pew Research Center (2011), http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-1_FINAL.pdf; *see generally* Emma Garcia and Elaine Weiss, *Early Education Gaps by Social Class and Race Start U.S. Children Out on Unequal Footing*, Economic Policy Institute (2011), http://www.epi.org/publication/early-education-gaps-by-social-class-and-race-start-u-s-children-

out-on-unequal-footing-a-summary-of-the-major-findings-in-inequalities-at-the-starting-gate/. Yet, though "[m]inority-group status may *in general* correlate with economic disadvantage, [] not all members of minority groups suffer equal economic disadvantage." Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. Legal Educ. 452, 464 (1997) (emphasis in original). Realizing the benefits of intraracial diversity—in this case, admission of racial minority students from a range of socioeconomic backgrounds, including elevated ones—can thus play a critical role in facilitating the effects of contact theory. Because such students are on a more equal social footing with the average nonminority student, contact is more effective in breaking down prejudice towards all members of the racial groups in question. *See* Deborah C. Malamud, *Affirmative action, Diversity, and the Black Middle Class*, 68 U. Colo. L. Rev. 939, 950 (1997) ("[I]ntegrating within social classes simplifies the process of integration by limiting difference to a single dimension.").

To the extent that social equality begets more frequent contact, it has a further salutary benefit: social science also makes clear that individuals having the most prior experience across racial lines are statistically more likely to be open to such experiences in the future. Bowman, 80 Rev. Educ. Res. at 7 ("[S]tudents who have had previous interactions with a particular group are much more likely to have future interactions.") (internal citation omitted); *accord* Pettigrew & Tropp, 90 J. Personality & Soc. Psych. at 766 ("We posit that the

process underlying contact's ability to reduce prejudice involves the tendency for familiarity to breed liking."). This suggests that universities seeking the benefits of diversity should seek to enroll not only minority students from districts in which they are the majority, but also students from all racial groups coming from racially integrated communities and school systems. This requires particular attention in the admissions process given that, as Justice Kennedy has stated, racial isolation in American schools is "the status quo." *Parents Involved in Community Schools*, 551 U.S. at 788 (2007) (Kennedy, J., concurring). Thus, universities seeking to overcome racial isolation and promote interracial contact must be able to select students who have experience with such contact, and can teach their peers that such contact is possible, and positive.

In sum, for these reasons, and others, the compelling interest that universities have in a diverse student body must be understood to include a more specific interest in intraracial diversity. As discussed below, UT's limited but explicit use of race in admissions is narrowly tailored to vindicate this interest. In contrast, UT's race-neutral policies do not and in fact constitute attempts to attain diversity that, in isolation, would run afoul of equal protection law.

II. UT's INTEREST IN INTRARACIAL DIVERSITY IS COMPELLED BY THE NARROW TAILORING REQUIREMENT OF STRICT SCRUTINY.

UT employs a multi-part admission process in its attempt to secure the benefits of racial diversity. To satisfy equal protection requirements, UT's associated classifications on the basis of race must be narrowly tailored to these benefits. UT's explicit consideration of race not only satisfies but is in fact mandated by this requirement. This is because UT's race-neutral means of attaining diversity, the Top Ten Percent Rule, is a racial classification that, in isolation, fails the narrow tailoring requirement. By contrast, UT's explicit consideration of race is narrowly tailored. Each of these points is discussed in turn in what follows.

(1) UT's Admission Policy Seeks Diversity in Multiple Ways.

UT has a multi-part admission process. The most important determinant of UT admissions, the so-called "Top Ten Percent ("TTP")" Rule, automatically grants admission to all students graduating in the top ten percent of their high school by class rank state wide.[4] Tex. Educ. Code Ann. § 51.803 (West 2009). This rule accounts for about 80% of the annual incoming class. *Fisher v. University of Texas at Austin*, 758 F.3d 633, 637 (5th Cir. 2015).

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[4] The TTP grants admission to students in the top ten percent to the state school of their choice, not only to UT. Tex. Educ.Code Ann. § 51.803 (West 2009).

The remainder is selected through the combination of two separate metrics: (1) an "Academic Index" ("AI"), which reflects standardized test scores and high school grades, and (2) a "Personal Achievement Index" ("PAI"), which "measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background," including race. *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, 2415-16 (2013) ("*Fisher I*"). After AI and PAI are assigned respective scores:

> [T]hey are plotted on a grid with the Academic Index on the x-axis and the Personal Achievement Index on the y-axis. On that grid students are assigned to so-called cells based on their individual scores. All students in the cells falling above a certain line are admitted. All students below the line are not.

Id. at 2416-17. Consideration of race within the PAI is the only portion of UT's admission policy that explicitly takes race into account. But UT seeks racial diversity by race-neutral means as well—through the TTP Rule.

This "hybrid approach for attaining diversity" is an artifact of history. Brief for Respondents at 11, *Fisher v. University of Texas at Austin*, No. 14-981 (filed Oct. 26, 2015), 2015 WL 6467640 at *11. In *Hopwood v. Texas*, 78 F.3d 932, 955 (1996), the United States Court of Appeals for the Fifth Circuit outlawed explicit consideration of race in university admissions. The Texas legislature responded by

enacting the TTP Rule to assure the admission of members of racial minority groups by race-neutral means, *i.e.* class rank. *Fisher v. University of Texas at Austin*, 631 F.3d 213, 224 (5th Cir. 2011) ("The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose."), *overruled on other grounds by Fisher I*, 133 S.Ct. 2411 (2013); *accord* Catherine L. Horn & Stella M. Flores, *The Civil Rights Project, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 16 (2003); Nicholas Webster, *Kirwan Inst. for the Study of Race & Ethnicity, Analysis of the Texas Ten Percent Plan* 8 (2007), http://kirwaninstitute.osu.edu/wp-content/uploads/2012/05/Texas-Ten-Percent_style.pdf. That the TTP Rule would result in the enrollment, in particular, of African-American and Latino students was based upon well-known and accepted patterns of residential and public school segregation across the State. *Fisher I*, 133 S.Ct. at 2433 (Ginsburg, J., dissenting) ("Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage."); *see also* Webster, *Texas Ten Percent Plan*, at 5; Marta Tienda, *et al.*, *Affirmative Action and the Texas Top 10% Percent Admission Law: Balancing Equity and Access to Higher Education*, at 3 (2008) ("Architects of the top 10% law expected that large numbers of black and Hispanic students would qualify for the admission guarantee because Texas high schools are highly segregated."); Robert M. Berdahl, *Policies of Opportunity: Fairness and Affirmative Action in*

the Twenty-First Century, 51 Case W. Res. L. Rev. 115, 124 ("[The] very success [of the percentage plan] to produce a diverse student body depends on continuing the *de facto* segregation of Texas high schools[.]"). In essence, the Texas legislature reasoned that, by skimming off the top of public schools state-wide, the University could capture the same numbers of African-American and Latino students that had previously been admitted under the UT affirmative action program invalidated in *Hopwood*. Thus, in an effort to comply with the law as it understood it to be, UT targeted admission efforts towards predominantly racial minority schools, substituting that for the prohibited targeting of racial minority students. Horn & Flores, *Percent Plans*, at 52-53.

The TTP Rule was not initially successful in achieving a substantial minority population. Laycock, 78 Tul. L. Rev. at 1811 (2004). Further, the other admission criteria adopted in the wake of *Hopwood* likewise undermined achievement of the goal of racial diversity. Thus, UT had initially supplemented the TTP Rule by reference to the intersection of AI (conventional academic metrics) and PAI (softer leadership considerations), without including race as a factor. *Fisher I*, 133 S.Ct. at 2415-16. Data from that era show that admissions based upon AI and PAI, with PAI not including any consideration of race, resulted in the systematic underrepresentation of African-American and Latino students. *See* Brief for Respondents at 9, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345), 2012 WL 3245488 at *9 (inter-

nal citation omitted) ("The odds of admission for a qualified African-American or Hispanic from the second decile of their high school class declined after the top 10% law took effect, whereas the odds for a similarly situated Caucasian applicant increased."). This comported with empirical patterns elsewhere:

> The truth is, that almost all the traditional considerations in admissions disproportionately help white students since they are much more likely to be legacies, to have households with more educational resources, to attend more competitive suburban schools, to receive more information about college, and to be able to pay for professional preparation for admissions tests.

Gary Orfield, *Foreword* to Horn & Flores, *Percent Plans*, at x-ix. Underrepresentation of African-American and Latino students by conventional academic metrics was also a reflection of the racial bias in standardized testing, on which AI substantially relied. *Fisher*, 758 F.3d at 647; Devon W. Carbado and Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 Cal. L. Rev. 1149, 1164 (2003) (book review).

Accordingly, and in the aftermath of this Court's decision in *Grutter*, UT re-introduced race as an explicit admissions consideration, based upon its view that it was not otherwise attaining sufficient racial diversity to achieve the desired educational benefits. *Fisher I*, 133 S.Ct. at 2416-17. Under the new UT policy, race–and specifically, African-American or Latino status–informs the PAI calcu-

lus as an unquantified "plus factor." *Id.* at 2416. As before, PAI is placed on the y-axis of a grid with AI plotted on the x-axis, and UT then draws "cells" at the intersection of students' individual AI and PAI scores. *Id.* at 2416. A step-like line is then drawn across the chart, with cells falling above the line signaling admission. *Id.* UT describes the resulting valuation of race as follows:

> UT's holistic review process is conducted by trained admissions officers who read files in their entirety. The process looks at each applicant as a whole person-thus offsetting the one-dimensional aspect of the Top 10% Law-and considers the applicant's race only as one factor among many used to "examine the student in 'their totality,' 'everything that they represent, everything that they've done, everything that they can possibly bring to the table.'" "Race is contextual, just like every other part of the applicant's file." Race allows readers to consider "how does the student maneuver in their own world, how do they maneuver in someone else's world"? No individual [PAI] factor is given any numerical value or is determinative.

Brief for Respondents at 11, *Fisher v. University of Texas at Austin*, No. 14-981 (filed Oct. 26, 2015), 2015 WL 6467640 at *11 (internal citations omitted).[5]

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[5] The District Court in this matter summarized the explicit valuation of race in UT's policy as, "a factor of a factor of a factor of a factor." *Fisher v. University of Texas at Austin*, 645 F.Supp.2d 587, 608 (W.D. TX 2009), *overruled by Fisher I*, 113 S.Ct. 2411.

In sum, UT employs a "hybrid approach" to achieving the benefits of racial diversity in its student body. *Id.* at 11. The TTP Rule provides a measure of African-American and Latino enrollment. But the numerical diversity thus achieved is insufficient to achieve the benefits of diversity that UT seeks, and UT accordingly supplements it with explicit consideration of race as one factor in computing PAI. *Id.* at 10. In this sense, UT considers race explicitly to enroll African-American and Latino students that would not otherwise be admitted by the TTP Rule alone. *Id.* at 29-33.

(2) Racial Classifications in University Admissions Must Be Narrowly Tailored to Achieve the Benefits of Diversity in Education.

The use of racial classifications compels strict judicial scrutiny under the Equal Protection Clause, which in turn requires not only that the policy reflect a compelling interest (discussed above) but also that the use of race be narrowly tailored to achieving it. *Fisher I*, 133 S.Ct. at 2414; *Grutter*, 539 U.S. at 334. In *Fisher I*, this Court held that the narrow tailoring requirement for the use of race in university admissions can effectively be reduced to two core principles: first, that consideration of applicants within racial groups must be individualized, and second, that the use of race must be necessary:

> It is at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions process-

> es "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." Narrow tailoring also requires a reviewing court to verify that it is "necessary" for the university to use race to achieve the educational benefits of diversity.

Fisher I, 133 S.Ct. at 2414 (internal citations omitted). The second of these principles—that explicit consideration of race must be necessary—is straightforward: "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity." *Id.* at 2420. But the first, that race must be considered at the level of individuals, requires further discussion in this context.

The Court's Fourteenth Amendment decisions in the area of equal protection have uniformly held that the right to equal protection belongs to individuals, not groups. *See, e.g., Bakke*, 438 U.S. at 289 ("It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.'") (internal citation omitted); *Parents Involved in Community Schools*, 551 U.S. at 743; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.") (emphasis in original); *J.E.B. v. Alabama*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) ("The neutral phrasing of the Equal Protec-

tion Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups."); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as *individuals*, 'not as simply components of a racial, religious, sexual or national class.'"") (emphasis in original) (internal citation omitted)). Thus, although governments may seek to advance the interests of racial minorities under some circumstances, they may not do so in blanket fashion by providing benefits to everyone in a group, based upon the race of that group, without invoking strict judicial scrutiny. *Parents Involved in Community Schools*, 551 U.S. at 741-42; *Adarand*, 515 U.S. at 227 ("It follows from that principle [that Equal Protection is an individual and not a group right] that all governmental action based on race—a *group* classification. . . —should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.") (emphasis in original). Indeed, advancing the rights of racial groups without regard to differences among individual group members presumes a commonality among group members that is tantamount to stereotyping and therefore unconstitutional. *Schuette*, 134 S. Ct. at 1634 (labeling as "'impermissible racial stereotypes'" the "assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the

polls'") (internal citations omitted); *Parents Involved in Community Schools*, 551 U.S. at 795 (calling a State's "[r]eduction of an individual to an assigned racial identity for differential treatment" "among the most pernicious actions our government can undertake."); *Shaw v. Hunt*, 517 U.S. 899, 916-18 (1996) (State redistricting plan that assumed African-American voters from one region of the State could compensate for vote dilution of different African-American voters in a distinct region was in violation of equal protection); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."); Harpalani, *Diversity within Racial Groups*, 15 U. Pa. J. Const. L. at 489 (noting the Court's consistent rejection of policies that inflect "stigmatic harm" by "treat[ing] individuals in the same manner based on racial group membership.").

The Court has enforced this rule consistently. Thus, where government seeks to advance the political representation of racial minorities in one or another field, the Court has insisted that the policies in question acknowledge and respect differences among members of the minority groups at issue. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 433-34 (2006) ("*LULAC*") ("[A] State may not 'assum[e] from a group of voters' race that they 'think alike, share

the same political interests, and will prefer the same candidates at the polls.''. . . We do a disservice to [the] important goals [of preventing discrimination in voting] by failing to account for the differences between people of the same race.") (internal citations omitted); *Shaw v. Reno*, 509 U.S. at 647 (1993) (finding a valid equal protection challenge to a redistricting plan that "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions . . . as impermissible racial stereotypes."); *Metro Broadcasting, Inc.*, 497 U.S. at 602 (1990) (O'Connor, J., dissenting) ("[T]he Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."); *id.* at 636 (Kennedy, J., dissenting)) (Calling it a "demeaning notion that members of . . .defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens.").

This element of the narrow tailoring requirement is equally applicable in the education context, and should inform this Court's analysis of what it means to consider race at the individual level in admissions. As the Court has written:

> The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a par-

> ticular racial group. The classification of applicants by race upheld in *Grutter* was only as part of a 'highly individualized, holistic review[.]' As the Court explained, '[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount.'

Parents Involved in Community Schools, 551 U.S. at 722-23 (2007) (internal citations omitted). As a result, any government policy that imposes educational benefits on the basis of racial status must do so in a way that recognizes differences between individual members of racial groups. Policies that, on the contrary, operate in a blanket fashion at the level of groups make impermissible assumptions about the interests and viewpoints of group members, perpetrate stereotypes, and are unconstitutional under the Equal Protection Clause's narrow tailoring requirement. *Grutter*, 539 U.S. at 334; *Gratz*, 539 U.S. at 270-71; *Bakke*, 438 U.S. at 307 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.").

(3) Considered in Isolation, the TTP Rule Fails the Narrow Tailoring Requirement.

As a means to attain racial diversity, UT's TTP Rule, considered in isolation, is not narrowly tailored to achieve the benefits of diversity in education, as it must be because, though it is nominally race-neutral, strict scrutiny applies "not only to legislation that contains explicit racial distinc-

tions, but also to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'" *Shaw v. Reno*, 509 U.S. at 643 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)). Here, there can be no doubt but that the TTP Rule was racially motivated; as a response to the *Hopwood* decision, it was specifically designed to preserve racial diversity in state universities. *Fisher I*, 133 S.Ct. at 2433 (Ginsburg, J., dissenting) ("[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious."). Moreover, any claim that the TTP Rule is intended to address academic qualifications is betrayed by the fact that it was understood by the Texas legislature to, and in fact did, lower UT's academic admission standards. *Fisher*, 758 F.3d at 645; Laycock, 78 Tul. L. Rev. at 1809. The TTP Rule is thus a racial classification, and standing alone, it would likely fail the Court's narrow tailoring requirement. That is because it both fails to consider race at the level of individuals, and is not necessary—and may even hinder—achievement of the benefits of diversity in education.

The TTP Rule fails to treat members of racial groups as individuals because it is, in fact, an "automatic" mechanism designed to capture numerical diversity in UT's student body, treating African-Americans and Latinos as groups and not individuals. *Fisher*, 758 F.3d at 654-55 (describing the TTP mechanism as "automatic"). Indeed, this follows directly from the TTP Rule's reliance on the proxy of geography (*i.e.*, the public school system

from which students come). Of course, *any* proxy, by definition, focuses on groups and ignores individual differences. *See* Laycock, 78 Tul. L. Rev. at 1810 (internal citation omitted); *see also* Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 Tex. L. Rev. 1847, 1860 (1996). That is, proxies operate by substitution of the proxy for the racial group as a whole, so any differences within groups are obscured by the proxy. Worse, the proxy only works in this case because of the segregation in geography and public schools state-wide;[6] that is, the TTP Rule increases

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[6] As set forth in UT's 2013 brief,

> [T]he racial diversity that the law does add is mostly a product of the fact that Texas public high schools remain highly segregated in regions of the State—*e.g.*, with overwhelmingly Hispanic student bodies in the Rio Grande Valley, and overwhelmingly African-American student bodies in urban areas such as Dallas and Houston. That limits the diversity that can be achieved within racial groups[.]

Brief for Respondents at 8, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345), 2012 WL 3245488 at *8 (internal citation omitted); *accord* Laycock, 78 Tul. L. Rev. at 1835 ("Texas also emphasized geographic diversity, taking advantage of the possibly unique circumstance of a vast region of the state with an overwhelmingly minority population. Along the Rio Grande from El Paso to Brownsville are cities and counties with huge Hispanic populations: 78% in El Paso County, 84% in Cameron, 88% in Hidalgo, 97.5% in Starr, and similar numbers in less populated counties."). Thus, TTP-admitted black and Latino students predominantly hail from "racially isolated schools." Horn & Flores, *Percent Plans*, at 28 (2003). "In Texas, almost half of all Latino and more than one-third of all black public school students attend a school of 90 percent minority students[.]" *Id.* A

minority enrollment only by guaranteeing seats to minority students specifically because they come from minority schools. In any event, the TTP Rule does not entail consideration of applicants as individuals; it does not consider diversity factors other than race (through its proxy); it insulates students from competition outside their typically segregated schools; and it treats minority individuals as fungible in the quest to attain diversity. This problem with the TTP Rule was recognized by the Fifth Circuit, below, which, "referred to the Top Ten Percent Law as 'a polar opposite of the holistic focus upon individuals' which was sanctioned by *Grutter*, and noted that 'its internal proxies for race end-run the Supreme Court's studied structure for use of race in university admissions decisions.'" Harpalani, 15 U. Pa. J. Const. L. at 507 (citing *Fisher*, 631 F.3d at 242.). For this reason, the nominally race-neutral aspect of UT's policy cannot, standing alone, satisfy the narrow tailoring requirement of strict scrutiny.

But the TTP Rule also fails the narrow tailoring test because, in isolation, it is not necessary to but instead hinders attainment of the benefits of diversity in education, specifically because it provides for a limited representation of racial minority groups and fails to achieve intraracial diversity. That is, because of its reliance on the proxy of a racially segregated geography (and the racially segregated schools that result), the TTP Rule tends to enroll racial minority students who are similar

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dearth of experience communicating with nonminority students in an educational context is thus another common feature of TTP minority enrollees.

across a number of axes. For example, "[g]eography in Texas often serves as a marker for both race and class," Webster, *Analysis of the Texas Ten Percent Plan*, at 8, so to the extent that geographic segregation reflects lower socioeconomic status, African-American and Latino students admitted under the TPP Rule tend to share a common trait of depressed socioeconomic background. Moreover, those minority students admitted under the TTP are likely to be less well-prepared for university academics. Brief for Respondents at 32, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345), 2012 WL 3245488 at *32 (discussing "tradeoffs" of the TTP Rule as inclusive of academic performance); Gary Orfield, *Foreword* to Horn & Flores, *Percent Plans*, at ix ("After several decades of progress, the educational achievement gap between racial groups began growing again in the 1990s. Dropout rates are rising after a long decline. Our public schools are becoming increasingly segregated by race and income and the segregated schools are, on average, strikingly inferior in many important ways, including the quality and experience of teachers and the level of competition from other students."); Laycock, 78 Tul. L. Rev. at 1803-04, 1808, 1817. Furthermore, "minority students admitted under the Top Ten Percent Law," share common academic interests, as evidenced by the fact that they "disproportionately enroll in certain schools and majors, and are underrepresented in other majors." Harpalani, 15 U. Pa. J. Const. L. at 512. As the Fifth Circuit explained:

> While the [TTP Rule] may have contributed to an increase in overall minority enroll-

> ment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity. For example, nearly a quarter of the undergraduate students in UT's College of Social Work are Hispanic, and more than 10% are African-American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African-American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African-American.

Fisher, 631 F.3d at 240 (internal citations omitted), *overruled on other grounds by Fisher I*, 133 S.Ct. 2411 (2013).

Even more generally, because the TTP Rule collects racial minority students from geographically compact, highly segregated pockets, students within this population are likely to share less tangible similarities of interest and culture. *See LULAC*, 548 U.S. at 402 (noting geography's correlation with viewpoint and culture); *Shaw v. Reno*, 509 U.S. at 646 (recognizing the correlation between geography and common interests in allowing for racial redistricting, noting that "when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

In sum, then, African-American and Latino students entering UT via the TTP Rule demonstrate similarities resulting from the common geography and educational background that the TTP targets.

These similarities include lower socioeconomic status, minimal experience in racially integrated environments, lesser academic preparedness, common fields of academic interest and pursuit, and a variety of other cultural markers that often intersect with geography and racial isolation.

In other words, the TTP Rule yields limited intraracial diversity in its student body. And in so doing, it undermines the benefits of diversity, failing to dismantle stereotypes and instead reinforcing them by creating a racial minority population with limited internal differences. *See* Bodde, 17 U. Pa. J. Const. L. at 806 ("[T]he failure to acknowledge individual variation within underrepresented racial groups entrenches presumptions of racial 'sameness[.]'") (internal citations omitted); Carbado & Gulati, 91 Cal. L. Rev. at 1158 (quoting an African-American graduate of UCLA Law School, "it is clear that my classmates were cheated because they were denied a diversity of views from Black people who occupied varying socio-economic identities") (internal citation omitted). This projection of sameness is especially harmful when—as here—the points of commonality fit readily with prevailing, negative stereotypes regarding African-American and Latino students: namely, that they are worse educated and of lower socioeconomic status. *See* Harpalani, 15 U. Pa. J. Const. L. at 513 (citing common stereotypes of African-American and Latino students).

The relative homogeneity of TTP enrollees also frustrates cross-racial understanding and integration. Low average socioeconomic status means that

African-American and Latino students entering through the TTP Rule are less likely to be considered the social "equals" of their cross-racial peers. *See* Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. Colo. L. Rev. 939, 950 (1997). The result, following Allport's contact theory, is that the salutary results of contact are undermined. Moreover, because TTP Rule minority enrollees are overwhelmingly from racially isolated schools, they have minimal prior contacts across racial lines and are therefore less likely to initiate them in the University setting.

The limitations on intraracial diversity wrought by the TTP Rule thus have seriously harmful consequences for UT's ability to achieve the benefits of diversity in education. As a result, it cannot be said that UT's nominally race-neutral policies are necessary for the achievement of diversity benefits in education. To the contrary, on their own, such policies impede the realization of benefits that can flow from a racially diverse student body. UT's TTP Rule, standing alone, thus neither treats members of racial minority groups as individuals, nor is necessary to achieve the benefits of diversity. Accordingly, it cannot, on its own, be considered a constitutional means of achieving racial diversity in education.

(4) UT's Limited, Explicit Use of Race in Admissions Satisfies the Narrow Tailoring Requirement.

By contrast, UT's entire system, inclusive of admissions through the use of AI and PAI with

explicit race-consciousness, is an appropriate means of attaining diversity in education under equal protection law. This is because UT's explicit consideration of race in PAI satisfies the twin requirements of narrow tailoring under *Fisher I*, 133 S.Ct. at 2414, namely, consideration of the differences between individuals and an absence of race-neutral alternatives.

UT's consideration of race operates at the level of individuals. Minority status is an unquantified "plus" in the calibration of PAI, which is then charted against AI to determine admissions. As UT has said:

> Each applicant is considered as a whole person, and race is considered "in conjunction with an applicant's demonstrated sense of cultural awareness,"' not in isolation. "Race is contextual, just like every other part of the applicant's file,"' "[t]he consideration of race helps [UT] examine the student in 'their totality[.]" Adding race to the mix in whole-file review 'increases the chance' that underrepresented minorities will be admitted. But because of the contextualized way in which race is considered, it is undisputed that consideration of race may benefit any applicant (even non-minorities)—just as race ultimately "may have no impact whatsoever"' for any given applicant (even an underrepresented minority).

Brief for Respondents at 14, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345), 2012 WL 3245488 at *14.

In turn, this type of consideration of race enables UT to attain a measure of intraracial diversity:

> [A]dmissions data show that African-American and Hispanic students admitted through holistic review are, on average, more likely than their top 10% counterparts to have attended an integrated high school; are less likely to be the first in their families to attend college; tend to have more varied socioeconomic backgrounds; and, on average, have higher SAT scores than their top-10% counterparts.

Id. at *33-34 (internal citation omitted). UT is thus better able to achieve the benefits of diversity in education:

> A critical mass of minority students, which includes sufficient diversity of viewpoints and experiences within each racial group, facilitates the educational benefits of diversity that *Grutter* held as a compelling interest: breaking down racial stereotypes and promoting cross-racial understanding and dialogue.

Harpalani, 15 U. Pa. J. Const. L. at 494. More specifically, UT's admission of African-American and Latino students who do not share the common traits of TTP minority enrollees can "dispel stereotypes that all racial minorities share the same backgrounds, experiences, and perspectives." Bodde, 17 U. Pa. J. Const. L. at 805 (internal citations omitted). African-American and Latino students who may come from higher socioeconomic status, racially integrated backgrounds, and count-

er-typical regions may serve as "debiasing agent[s]," promoting disequilibrium to disrupt stereotypical associations. Carbado, 60 UCLA L. Rev. at 1151. These students are also likely to be better able to promote communication and integration on campus. Because they may be from higher socioeconomic backgrounds, and therefore have more equal social standing, they will better facilitate cross-racial understanding under Allport's contact theory. And, because these students are more likely to come from integrated backgrounds, they are likely to experience more familiarity in interracial contexts, making future cross-racial communication more likely and more successful at fostering understanding. It is in this sense that UT noted "[t]hese students have great potential for serving as a 'bridge' in promoting cross-racial understanding[.]" Brief for Respondents at 34, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345), 2012 WL 3245488 at *34.[7] UT's limited, explicit consideration of race is thus both individualized and uniquely capable of achieving the benefits of diversity in education.

Moreover, UT's individualized consideration of race is in fact necessary to achieving intraracial diversity and its attendant benefits; no race-neutral alternative exists. This is because race-neutrality here entails the use of proxies for race, and

[7] Of course, students may be selected for their ability to bridge racial gaps regardless of their own racial status. So, for example, UT may consider that white students from predominantly African-American or Latino neighborhoods or school systems should be valued for their diversity benefits.

proxies, as previously discussed, neither treat people as individuals nor achieve intraracial diversity. Instead, proxies lump racial minorities into groups that are defined by the proxy. *Grutter* specifically noted this problem in finding that, "a plan that, though race-neutral, . . . may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340.

Ultimately, in order to address issues of race in accordance with equal protection law, governments must consider race directly, as UT does with its PAI. By selecting individuals in this manner, UT can find the overlap between desired individual criteria and race that allows it to achieve intraracial diversity. Bodde, 17 U. Pa. J. Const. L. at 814-15 ("Creating [intraracial diversity] necessarily requires explicit attention to building a healthy group presence of racial minorities and attending to the conditions of that setting, which in turn requires explicit attention to race itself.") (internal citation omitted). UT's use of race is thus permissible and consistent with this Court's Equal Protection doctrine.

CONCLUSION

Universities like UT have a compelling interest in racial diversity. True diversity—within and across racial groups—can provide great educational benefits that have been recognized by this Court. But to achieve these benefits, universities must insure

intraracial diversity which looks past racial categories to individual applicants and to their particular characteristics. In this way, universities can enroll student bodies that defy racial stereotypes and promote campus integration. Race-neutral alternatives fall short in this regard. They rely on proxies that treat individual members of minority groups as fungible, and they assemble minority populations on campus that promote stereotypes and recreate the segregation so prevalent in society at large. UT's explicit consideration of race in admissions, albeit in a limited manner, by contrast furthers the goal of achieving the benefits of diversity; for these reasons, this Court's equal protection jurisprudence does not condemn the UT program, but compels it.

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Respectfully submitted,

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APPENDIX

APPENDIX A

Amici Curiae Education Reform Now ("ERN"), an educational think tank, and its associated political action committee, Democrats for Education Reform ("DFER"), share a mission to encourage a more productive dialogue toward the end of fundamental reform in American public education. DFER operates on all levels of government to educate elected officials and support education reform-minded candidates for public office.

Amicus Curiae Green Dot Public Schools is a non-profit organization whose mission is to help transform public education so that all students graduate prepared for college, leadership and life. Green Dot Public Schools serves approximately 12,000 students in grades six through twelve living in traditionally underserved communities in Los Angeles, California, Memphis, Tennessee and Tacoma, Washington. Its student demographics illustrate why it subscribes to this *amicus* brief: over 99% of its students are African-American or Latino, and they come from families with an average family annual household income is approximately $23,000.

Amicus Curiae the Northeast Charter Schools Network is the membership association for public charter schools in New York and Connecticut. Its mission is to support and expand the high quality charter school movement in New York and Connecticut. The vast majority of its member schools serve student bodies that are predominantly students of color, and the vast majority of its member schools have college entrance and completion as a

critical part of their mission and programming. Efforts to promote intraracial diversity at the higher education level are necessary to ensure that these students have equal educational opportunity. Moreover, these students will benefit from continued racially diverse learning environments at the colleges and universities they attend because they have already been exposed to diverse cultures and backgrounds throughout their education career. As such, the Northeast Charter Schools Network has an interest in ensuring that initiatives like UT's intraracial diversity policy are allowed to continue because they help its member schools achieve their mission to expand educational opportunity and provide students with the skills they need to be successful.

Amicus Curiae A+ Denver is a nonprofit organization working to build public support for school reform and to advocate for the change necessary to dramatically increase student achievement in public education in Denver. A+ Denver seeks to hold schools to high standards, including through effective district management, and to raise awareness about issues that matter most for Denver's students. A+ Denver focuses on the intersection of policy, practice, and politics in its advocacy.

Amicus Curiae Students Matter is a national nonprofit organization that initiated litigation that will promote access to quality public education. Students Matter emphasizes the importance of policy regarding the employment, oversight, and development of public school teachers, as an aspect of providing the best public school education for all students. Active in litigation, Students Matter was

part of the legal team in *Vergara v. California*, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014), which successfully challenged the provision of disproportionately unqualified teachers to low income and minority students.